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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

FLOYD J. CARTER
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORIGINAL

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Floyd J. Carter, pursuant to The Supreme Court of the United States Rule 39 and 18 U.S.C. § 3006A(d)(6), asks for leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the District of New Jersey and on appeal to the United States Court of Appeals for the Third Circuit, and consistent with The

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Supreme Court of the United States Rule 39, no Affidavit is required to be filed in support of this motion.

Dated: August 11, 1999

Respectfully submitted,

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99-5716

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In The
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRITT OF CERTIORARI

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99-5716
Carter
v.
United States

QUESTION PRESENTED

Whether federal bank larceny, 18 U.S.C. § 2113(b), is a lesser included offense of federal bank robbery, 18 U.S.C. § 2113(a), as a matter of law.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Floyd J. Carter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is unreported. Its judgment and opinion are attached at Petitioner's Appendix ("Pet. App.") 1a-10a. The district court's opinion, also unreported, was stated on the record at trial and is attached at Pet. App. 11a-22a.

JURISDICTION

The court of appeals entered judgment in this case on June 16, 1999. (Pet. App. 2a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The "Bank robbery and incidental crimes" provisions of Chapter 103 ("Robbery and Burglary") of

Title 18 are the central statutory provisions involved. The entirety of 18 U.S.C. § 2113 is set forth in the Appendix (Pet. App. 35a-36a), along with the predecessor to the present statute, 12 U.S.C. § 588b ("Robbery of bank; assault in committing or attempting to commit bank robbery; receiving or disposing of stolen goods") (*id.* at 36a-37a). In 1948, 12 U.S.C. § 588b was recodified at 18 U.S.C. § 2113. The amendments that accompanied the 1948 recodification appear to have been made to conform the provision with § 1 of Title 18 ("Offenses Classified") (*id.* at 37a).

STATEMENT OF THE CASE

Last Term, this Court granted certiorari to determine the exact same issue presented by this case: namely, whether federal bank larceny constitutes a lesser included offense of federal bank robbery. *See Mosley v. United States*, 118 S. Ct. 1298, 1299 (1998) (granting certiorari). The Court was deprived of the opportunity to settle this issue, however, because Mr. Mosley died after the parties briefed and argued the case, but before this Court could render a decision on the merits. After Mr. Mosley's death, the writ was dismissed. *See Mosley v. United States*, 119 S. Ct. 484 (1998) (dismissing certiorari).

This case, which presents precisely the same question as *Mosley*, offers the Court an opportunity to resolve the continuing split in the courts of appeal that prompted review in *Mosley*. Consistent with the text, structure, and history of the bank robbery and bank larceny statutes, several courts of appeal permit juries to be instructed on the lesser included offense of bank larceny. The Third and Ninth Circuits, which are in the minority, hold that, as a matter of law, the larceny instruction cannot be given in a bank robbery case, even where the evidence supports it and the defense requests it. Like *Mosley*, this case also raises fundamental questions about the role played by established common law meanings of a phrase or term when a court interprets a federal criminal

statute incorporating that phrase or term. This Court should therefore grant certiorari in this case to finish the task it began last Term.

Factual Background. On September 9, 1997, petitioner Floyd J. Carter, unarmed (C.A. App. 165)[1] and wearing a ski mask to conceal his identity, ran into the Collective Savings Bank in Hamilton, New Jersey, for the purpose of stealing money from the bank (*id.* at 155). Although he had waited outside the bank until he thought all the customers had left (*id.* at 156 ("I thought nobody was in there.")), on his way into the bank, petitioner bumped into a customer as she was walking out the door (*id.* at 156). With only one goal in mind – to "take the money and run" – petitioner quickly stepped around the customer. (*Id.* at 157.) He proceeded to an unoccupied teller station, specifically so that he would not "scare nobody or nothing." (*Id.* at 159-60.)

Petitioner jumped over the unoccupied teller station, pulled open the drawer, and emptied it of its money. (C.A. App. 160.) He ran to two other drawers behind the counter, emptying them into a bag as well. (*Id.*) As petitioner was filling his bag, he told the tellers not to worry and assured them that he would not hurt anybody. (*Id.* at 160-61.) After he finished collecting money from the open teller drawers, he went back to the unattended teller station to avoid direct contact with the tellers and jumped back over the counter. (*Id.* at 162.) He seized approximately $16,000 in cash from the unoccupied teller stations. (*Id.* at 164-65; Pet. App. 5a.) As he ran out the door, petitioner told the bank employees, "Don't bother following me, I run fast." (C.A. App. 164.)

[1]"C.A. App.," followed by a page number, refers to the appendix filed with petitioner's brief in the Third Circuit.

Later that same day, the police apprehended petitioner.[2] During questioning, petitioner admitted that he stole the money from the bank. (C.A. App. 116-17.) Petitioner never denied his involvement, his conduct, or the facts surrounding the theft of the Collective Savings Bank. He was charged on September 12, 1997, in the District of New Jersey with bank robbery in violation of 18 U.S.C. § 2113(a). (*Id.* at 8.) After admitting to all the basic facts (*id.* at 116-17), petitioner pleaded not guilty to the charge of bank robbery (*id.* at 3 (Docket Entry No. 5)).

District Court Rulings. At a status conference on January 20, 1998, the district court addressed petitioner's pretrial motion requesting that the court instruct the jury on the lesser included offense of bank larceny. (C.A. App. 11-18.) The court initially concluded that an instruction that bank larceny constitutes a lesser included offense of bank robbery would be improper, but deferred the ultimate determination of the issue until later.[3] (*Id.*)

The trial lasted for two days in January 1998. Petitioner moved for acquittal after the close of the Government's case, arguing that the Government had failed to produce sufficient evidence upon which a jury could reasonably find petitioner guilty of bank robbery. (C.A. App. 127-29.) The district court denied the motion for acquittal and suggested that the requested larceny instruction

[2]Terry A. Stilwell, petitioner's get-away driver, also was apprehended that same day. He entered a plea agreement and was sentenced to two years and 4 months in prison. (C.A. App. 5-6.)

[3]The district court expressly relied upon the Third Circuit's decision in *United States v. Mosley*, 126 F.3d 200 (3d Cir. 1997), *cert. dismissed*, 119 S. Ct. 484 (1998), stating that "[i]t's a legal decision and we simply, by analyzing the text of these two statutes, the bank robbery and the bank larceny statute[s], *we decline to follow the majority of the circuits* in finding the latter to [be] the lesser included offense and we so hold." (C.A. App. 14 (emphasis added).)

would not be given.[4] (Pet. App. 18a-22a.) At the close of all the evidence, petitioner renewed his motion for acquittal, and the motion was denied. (C.A. App. 191-92.) When the district court charged the jury, the requested larceny instruction was not given. (*Id.* at 239-60.) The court instructed the jury on the charge of bank robbery alone and explained that, for the jury to find the defendant guilty, it needed to be satisfied that the Government proved "that the defendant acted knowingly and willfully." (*Id.* at 251-52.) The court included a "specific intent element" in the bank robbery instruction, defining "willfully" for the jury as an instance when a "person acts voluntarily and with the specific intent or purpose to do something the law forbids."[5] (*Id.* at 252). The court also explained that "[t]he essence of the offense is the taking of money or property aided and accompanied by intentional, intimidating behavior on the part of the particular defendant. The focus is on the conduct of the accused. The conduct must be reasonably calculated to produce fear of bodily harm." (*Id.* at 290). On January 23, 1998, the jury returned a verdict of guilty on the bank robbery charge.

Prior to sentencing, petitioner had been indicted in the Eastern District of Pennsylvania on three counts of bank larceny on the basis of conduct remarkably similar to that for which he was convicted of bank robbery in New Jersey. (C.A. App. 263-65.) Petitioner pleaded guilty to the bank

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[4]In denying the motion, the district court again relied on the *Mosley* decision, explaining that "as a matter of law *in this Circuit* . . . the bank larceny offense is not a lesser included offense of the bank robbery offense because the bank larceny offense has a specific intent to steal element not found in the bank robbery offense." (Pet. App. 20a (emphasis added).)

[5]This Court recently defined "willfully" as "with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *United States v. Bryan*, 118 S. Ct. 1939, 1946 (1998). After using specific intent to describe "willfully," the district court did not further instruct the jury as to the meaning of "specific intent." (C.A. App. 252, 288-89.)

larceny charges, which subsequently were transferred to the District of New Jersey pursuant to Federal Rule of Criminal Procedure 20. (Presentence Investigation Report ¶ 3.)[6] Each of the larceny charges involved the same basic methods petitioner used to take money from the Collective Savings Bank. Specifically, according to all the larceny counts, petitioner had run into a bank wearing a ski mask, jumped over a teller counter, and taken money from a teller drawer. (*Id.* at ¶ 31.) The larceny charges were consolidated with the bank robbery charge for sentencing in the District of New Jersey.

The court sentenced petitioner to prison terms of 17 years and 11 months for bank robbery and 10 years on each bank larceny charge and directed that the larceny and robbery sentences run concurrently. (Pet. App. 24a.) On November 6, 1998, petitioner moved to amend the judgment. (C.A. App. 332.) The court amended the judgment in December 1998, resentencing petitioner to prison terms of 17 years and 11 months for bank robbery and two years for each bank larceny conviction and ordering that the sentences run concurrently. (Pet. App. 29a.)

The Decision of the Court of Appeals. Petitioner appealed his conviction, contending, among other things, that the district court erred by refusing to instruct the jury on the lesser included offense of bank larceny.[7] (Pet. App. 6a). The court of appeals affirmed. (*Id.* at 10a.)

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[6]Pursuant to Local Appellate Rule 30.3(c), the Presentence Investigation Report was filed with the Third Circuit on appeal.

[7]Petitioner not only argued that, as a matter of law, the jury instruction omitting larceny as a lesser included offense of bank robbery was erroneous, but also explained that the facts of his case clearly warranted the instruction. (Pet. Opening Third Circuit Brief at 13-17.) Similarly, petitioner contended that the district court should have granted a judgment of acquittal because a reasonable jury could not have found petitioner guilty of bank robbery based on the evidence presented and, therefore, the Government could not carry its burden of proof at trial. (*Id.* at 42-43.) Petitioner relied on the testimony of the Government's witnesses – including Maria Zahn, the customer (C.A. App. 38, 42); Marjorie Cudney, the customer service representative (*id.* at 72-73); and Robert Phipps, the branch manager (*id.* at 111) – who

The court of appeals concluded that "the district court committed no error in refusing to instruct the jury on bank larceny because this court's holding in *Mosley* appropriately rested solely on a legal interpretation of Sections 2113(a) and (b)." (Pet. App. 7a (*citing United States v. Mosley*, 126 F.3d 200, 204 (3d Cir. 1997), *cert. dismissed*, 119 S. Ct. 484 (1998)).) The court of appeals also cited its decision in *United States v. Brown*, 547 F.2d 36, 39 (3d Cir. 1976), in which it had earlier held that "specific intent is not an essential element of a violation of" the bank robbery statute. (Pet. App. 8a.) Next, the court reiterated its conclusion that Congress, in the current robbery statute, did not employ common law language to define bank robbery and bank larceny. (Pet. App. 8a *(citing Bell v. United States*, 462 U.S. 356, 360 (1983)).) Finally, according to the Third Circuit, "[s]ection 2113(b) is broader than the common law definition because common law larceny was limited to thefts of tangible personal property." (*Id.*) These were essentially the same reasons the Third Circuit articulated to support its decision in *Mosley*.[8]

REASONS FOR GRANTING THE PETITION

There are three compelling reasons why this Court should grant certiorari in this case. First, the case presents an issue which this Court correctly deemed worthy of review just last Term, but which the Court lost the opportunity to decide through happenstance. Second, the Third Circuit's

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consistently testified that petitioner made no demands of them or threats against them.

[8]As in the instant case, the defendant in *Mosley* had been indicted for bank robbery in violation of 18 U.S.C. § 2113(a). He went to trial to challenge the application of the bank robbery statute to his conduct. He argued that, because he did not use force and violence or intimidation, he was guilty not of bank robbery but of bank larceny. The district court refused to instruct the jury on bank larceny, and the jury found *Mosley* guilty of bank robbery. On appeal, the Third Circuit concluded that, as a matter of law, bank larceny is not a lesser included offense of bank robbery and thus established the precedent on which the decision in this case squarely rests. See *Mosley*, 126 F.3d at 206.

holding in this case conflicts directly with the holdings of several other circuits. *See United States v. Mosley*, 126 F.3d 200, 206 (3d Cir. 1997) (collecting cases acknowledged to conflict), *cert. dismissed*, 119 S. Ct. 484 (1998). This case thus presents the same clear split among the circuit courts of appeal that prompted review of the same question last Term. Finally, this split among the circuits should be resolved in order to prevent the unfair administration of justice. Specifically, the conflict among the circuits results in the intolerable disparate treatment of those defendants who happen to be charged in a jurisdiction within the Third Circuit, rather than in virtually any other jurisdiction within the United States.

1. Only last Term, this Court granted certiorari in *Mosley v. United States*, 118 S. Ct. 1298, 1299 (1998), to review the Third Circuit's decision that, as a matter of law, bank larceny in violation of 18 U.S.C. § 2113(b) is not a lesser included offense of bank robbery in violation of 18 U.S.C. § 2113(a). After the case was briefed and argued before this Court, but before a decision on the merits had been rendered, Mr. Mosley died. His untimely death led this Court to dismiss the petition without rendering a decision on the merits. *See Mosley v. United States*, 119 S. Ct. 484 (1998). The reasons supporting this Court's decision to grant review in *Mosley* – the decisional conflict among the circuits and the important problems of statutory interpretation presented when Congress defines federal crimes in terms that are rich with common law meaning and tradition – apply with equal force in this case. Certiorari, therefore, should be granted.

2. The same clear split among the circuits that prompted this Court to grant review last Term in *Mosley* persists today. Most courts of appeals that have considered the question have concluded that bank larceny is a lesser included offense of bank robbery. Others, a minority, have reached the opposite conclusion.

Since Congress codified the bank robbery and incidental crimes provisions into law, only the Third and Ninth Circuits have refused to follow the common law tradition that bank larceny constitutes a lesser included offense of bank robbery. *See Mosley*, 126 F.3d at 206; *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989). The Third Circuit itself has expressly acknowledged that its interpretation of the bank larceny statute conflicts directly with the majority of circuits, which have concluded that, just as with common law larceny and robbery, bank larceny is a lesser included offense of bank robbery. *Compare Mosley*, 126 F.3d at 206 ("Therefore, we reject the majority view that bank larceny is a lesser included offense of bank robbery.") *with United States v. Henson*, 945 F.2d 430, 441 (1st Cir. 1991) ("failure to instruct on the lesser charge of bank larceny" was not plain error); *United States v. Walker*, 75 F.3d 178, 180 (4th Cir. 1996) ("It is undisputed that bank larceny is a lesser-included offense of bank robbery."); *United States v. Amos*, 566 F.2d 899, 901 (4th Cir. 1977) (vacating concurrent bank larceny sentence on ground that "the convictions for less aggravated forms of bank theft merge into the conviction for the more aggravated form of bank robbery"); *United States v. Flint*, 534 F.2d 58, 60 (5th Cir. 1976) (affirming district court's refusal to give instruction on lesser included offense of bank larceny based on the evidence, but indicating that bank larceny is a lesser included offense of bank robbery); *United States v. Cady*, 495 F.2d 742, 747-48 (8th Cir. 1974) (recognizing that bank larceny is a lesser included offense of bank robbery); *United States v. Brittain*, 41 F.3d 1409, 1410 (10th Cir. 1994) (holding bank larceny is a lesser included offense of bank robbery); and *United States v. Cornillie*, 92 F.3d 1108, 1109 (11th Cir. 1996) (reviewing district court's refusal to charge jury "on the lesser included offense of bank larceny").

It is clear that the Third Circuit and Ninth Circuit have erred in concluding that bank larceny is not a lesser included offense of bank robbery. First, applying the textual elements test adopted

by this Court in *Schmuck v. United States*, 489 U.S. 705, 716 (1989), it is evident that bank larceny represents a textual subset of bank robbery, with elements identical to bank robbery save for the "force and violence or intimidation" element unique to bank robbery. Under *Schmuck*, one offense is the lesser included of another if "the elements of the lesser offense are a subset of the elements of the charged offense." *Id.* Although this Court emphasized in *Schmuck* that the analysis must be "textual," *id.* at 720, it did not hold that the exact same words that define an element in the lesser offense must appear in the definition of the element in the greater offense. The Third Circuit erred in *Mosley*, and thus in this case, by adopting the very sort of 'magic words' approach that *Schmuck* avoided. Thus, although the bank robbery provision (18 U.S.C. § 2113(a)) does not contain the phrase "intent to steal or purloin" found in the bank larceny provision (18 U.S.C. § 2113(b)), the bank robbery provision does contain terms tantamount to "steal or purloin" – namely, the phrase "takes or attempts to take from the person of another."[9] The terms employed in both provisions correspond closely to one another and are alternative means of defining the same intent element.

Second, the premise that the bank robbery statute lacks an intent element – which element the Third Circuit concluded distinguishes federal bank larceny from the federal bank robbery – runs afoul of the common law understanding of robbery, on which the statute is based. Moreover, it runs afoul of the Court's seminal decision in *Morissette v. United States*, 342 U.S. 246, 263 (1952)(*mens rea* or intent is impliedly contained in a statute codifying a common law crime). In fact, contrary to Third Circuit law but consistent with the common law interpretation of the robbery statute, the district court here even instructed the jury that it must find that a defendant had acted with "specific

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[9]The word "steal" is commonly defined as "to take the property of another." *Webster's New Collegiate Dictionary* 1138 (2d ed. 1974). "Purloin" is a synonym for "steal." *Id.* at 937.

intent" to show that the defendant "willfully" carried out the crime of bank robbery. (C.A. App. 252.)

This Court has recognized that criminal statutes generally "include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[10] *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70-71 (1994) (collecting and analyzing cases on scienter requirements); *see also Staples v. United States*, 511 U.S. 600, 605 (1994) (reasoning that although the statute at issue, unlawful possession of an unregistered firearm, did not specifically contain a *mens rea* element, the statute must be construed "in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded") (internal citation omitted).

Third, Congress has, since it first criminalized federal bank robbery in 1934, spoken in traditional terms that are familiar from such common law sources as Blackstone, Hawkins, and East. Nor has Congress, in modifying the bank robbery statute since that time, severed the statute's deep roots in the common law tradition. Each of the three phases that led to the codification of the bank robbery and bank larceny provisions as they presently stand – the passage of the original bank robbery act in 1934;[11] the expansion of the statute to criminalize bank larceny and unlawful entry

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[10]The only exceptions are strict liability statutes "that regulate potentially harmful or injurious items." *Staples v. United States*, 511 U.S. 600, 607 (1994). "Such public welfare offenses have," however, "been created by Congress, and recognized by this Court, in 'limited circumstances.'" *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978)) (emphasis added).

[11]Bank robbery was first made a federal crime in 1934. The relevant act, in terms virtually verbatim from common law sources, stated as follows:

Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other

in 1937;[12] and the rephrasing of the act as part of the 1948 recodification[13] – preserved the common law language and meaning of bank robbery and bank larceny. Just as was the case before the 1948 recodification of the federal criminal code, the contemporary definitions of bank robbery and bank larceny hew closely to common law sources, and these sources therefore imbue these federal statutory provisions with meaning. Congress has not stated plainly or otherwise intimated that it intended to break from the common law.

Given the established common law meanings of larceny and robbery to which Section 2113 remains firmly anchored, the Third Circuit was wrong to conclude that the lack of an express intent

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thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both. Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 783, 783; *cf.* 4 William Blackstone, *Commentaries* *241 ("robbery" is "felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear[]."). The phrase "feloniously takes" signifies the intent to steal. *See United States v. Turley*, 352 U.S. 407, 410 n.4 (1957) ("felonious" means "having criminal intent"); *Black's Law Dictionary* 617 (6th ed. 1990) ("Felonious taking. As used in the crimes of larceny and robbery, it is the taking with intent to steal.").

[12]In 1937, Congress amended the 1934 Act to criminalize bank larceny and unlawful entry of a bank. *See* Act of Aug. 24, 1937, ch. 747, 50 Stat. 749, 749. In that instance, as well, Congress adopted the language of the common law. (Pet. App. 34a-35a.).

[13]In 1948, Congress recodified the bank larceny and robbery provisions as Subsections (b) and (a), respectively, of 18 U.S.C. § 2113, in substantially the same terms they have today. *See* Act of June 25, 1948, ch. 645, § 2113, 62 Stat. 683, 796-97. The only textual change relevant here is the deletion of the modifier "feloniously" from the bank robbery statute. *Compare* 12 U.S.C. § 588b(a) (1940) ("Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another") *with* 18 U.S.C. § 2113(a) (Supp. V 1947-52) ("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another"). This deletion was merely a change in phraseology to eliminate unnecessary felony classifications. *See United States v. Richardson*, 687 F.2d 952, 957 (7th Cir. 1982) ("Generally, in the 1948 codification of the criminal statutes an effort was made to avoid redundant use of the words 'felony' and 'misdemeanor.'").

element in the robbery subsection bars the interpretation of larceny as a lesser included offense of robbery. When the common law serves as the basis for a statute, the "cluster of ideas" that makes up that common law rule supplies the meaning for common law terms in the statute. *Morissette*, 342 U.S. at 263. Absent a specific congressional pronouncement to the contrary, any superficial textual discrepancies between Sections 2113(a) and (b) must be resolved by applying the established view of the common law, adopted by Congress, that both robbery and larceny alike require proof of a specific intent to steal. *Id.*[14]

Congress employed the language of the common law to define the offenses of bank robbery and bank larceny. By adopting the common law language, Congress included the common law intent element of robbery in the statutory offense. *See United States v. Turley*, 352 U.S. 407, 411 (1957) ("[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."); *Morissette*, 342 U.S. at 263. Indeed, the title of the 1937 act adding bank larceny to the criminal code – "AN ACT To amend the bank-robbery statute to include burglary and larceny," Act of Aug. 24, 1937, ch. 747, 50 Stat. 749, 749 – also expressly adopted the familiar nomenclature of common law crimes. Consistent with this Court's decision in *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1226 (1998), the use of common law terms in the title of an act to amend a criminal statute

[14]Maintaining the traditional common law understanding of bank robbery and bank larceny also comports with this Court's decision in *Jones v. United States*, 119 S. Ct. 1215 (1999). In *Jones*, the Court explained that a statute's text can only go so far in establishing legislative intent. *Id.* at 1216-17. As a result, in interpreting statutes, courts also must consider that "[s]tatutory drafting . . . occurs against a backdrop not merely of structural conventions of varying significance, but of traditional treatment of certain categories of important facts." *Id.* at 1216.

should resolve any doubt that Congress intended bank robbery and bank larceny to share the same specific intent element, just as they did at common law.

Finally, this Court's decision in *Prince v. United States*, 352 U.S. 322 (1957), reinforces the conclusion that larceny is a lesser included offense of robbery. The Court determined in Prince that robbery and unlawful entry share the same criminal intent to steal, reasoning that "the heart of the crime [of unlawful entry] is the intent to steal. This mental element merges into the completed crime if the robbery is consummated." *Id.* at 328. It follows, then, that bank robbery itself requires the intent to steal, for otherwise these two offenses could not merge.

* * *

Given that the elements of both statutes are substantively identical, that the bank larceny and robbery provisions mirror the common law, and that the history of the statutes proves Congress' intent to maintain the common law meaning, it is clear that bank larceny is a lesser included offense of bank robbery. This Court should grant certiorari to correct the Third Circuit's erroneous view that bank larceny constitutes an altogether separate crime from bank robbery and therefore mend the persistent division among the courts of appeal over this very important issue.

3. A failure to grant certiorari in this case would perpetuate the unfair administration of justice in those circuits that refuse to apply the common law understanding that bank larceny is a lesser included offense of bank robbery. First, maintaining the status quo permits similarly situated defendants to be treated differently not because of their conduct, but merely as a consequence of their location. Only intervention by this Court can put an end to the unequal treatment of similarly situated defendants among the several circuits.

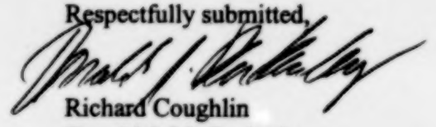
Second, allowing the view that bank larceny is not a lesser included offense of bank robbery

to stand impedes the ability of juries to determine the outcome of cases properly within their purview. As the Third Circuit recognized in *Mosley*, to hold that bank larceny is not a lesser included offense of bank robbery means that "if a jury concludes that a defendant did not use force and violence or intimidation in a bank robbery case, but nevertheless intended to steal or purloin the property or money, it must acquit the defendant if the indictment is only for bank robbery." 126 F.3d at 206 n.6. Such a decision places juries in the awkward position either of acquitting defendants who obviously committed some crime, or of convicting a defendant of an offense that is unduly severe. It also strips the jury of its role as mitigator because it stifles a jury's ability to protect against the "potential or inevitable severity of sentences" when the issues surrounding a prosecution point to "political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences." *Jones*, 119 S. Ct. at 1225.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5491

UNITED STATES OF AMERICA,

v.

FLOYD J. CARTER,
Appellant

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 97-cr-00520-1
District Judge: Honorable Mary L. Cooper

Submitted Under Third Circuit LAR 34.1(a) May 19, 1999

Before: BECKER, Chief Judge, RENDELL and ROSENN, Circuit Judges.

(Filed)

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a).

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SUPREME COURT, U.S.

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

P. Douglas Sisk, Clerk

Dated: June 16, 1999

Certified as a true copy and issued in lieu
of a formal mandate on July 13, 1999

Teste:

Clerk, United States Court
of Appeals for the Third Circuit

UNREPORTED - NOT PRECEDENTIAL

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MEMORANDUM OPINION

ROSENN, Circuit Judge.

Appellant Floyd J. Carter and Terry Stillwell were charged in a one-count indictment with bank robbery in violation of 18 U.S.C. § 2113(a) in the United States District Court for the District of New Jersey. Stillwell pleaded guilty and, on January 23, 1998, a jury found Carter guilty of bank robbery. On October 15, 1998, the district court sentenced the defendant, Carter, to 215 months in prison.[1] Defendant appealed. We affirm.

I.

At approximately 2:00 p.m. on September 9, 1997, the defendant entered the Collective Federal Savings Bank in Hamilton Township, New Jersey, wearing several layers of clothing and a ski mask that covered his entire face except for his eyes and mouth. As he entered, a customer, Maria Zahn, was leaving. Ms. Zahn attempted to exit

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[1]The district court had subject matter jurisdiction under 18 U.S.C. § 3231 and this court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(1) and (2).

around him, but the defendant pushed her back inside. Ms. Zahn was so terrified that she screamed, startling others within the bank.

At that point, Carter ran toward the customer service counter, and with a single leap, vaulted over the counter and through one of the teller windows to the area behind the counter where tellers Anastasia Hairston, Christine Sentech, and Mildred Calacal were standing. Ms. Hairston ran to the office of the branch manager, Robert Phipps, yelling that a robber was after her. Meanwhile, the defendant opened Ms. Hairston's teller drawer and emptied money into a brown paper bag. He then quickly moved to within two feet of where Ms. Sentech and Ms. Calacal stood and proceeded to empty their teller drawers. Meanwhile, Ms. Zahn ran out of the bank, got into her car, laid down on the floor and prayed until the authorities arrived.

After having removed almost $16,000 in currency from the teller drawers, the defendant hurdled back over the teller counter and warned that no one was to follow him. He ran to a getaway car operated by Terry Stillwell, climbed into the trunk, and closed the hatch. The car then sped off. A short while later, the police arrived. At that point, a description of the getaway car was broadcasted over police radio. Eventually, other officers stopped the getaway car and apprehended Carter and his disguise. The defendant subsequently waived his Miranda rights and confessed to FBI special agent James Maxwell that he and Stillwell had driven to Hamilton Township from New Brunswick to rob the bank.

II.

The defendant's primary issue on appeal is the district court's decision to reject his request to instruct the jury on bank larceny. The district court's decision to reject his request is subject to plenary review. See United States v. Price, 13 F.3d 711, 724 (3d Cir. 1994).

A.

The defendant argues that, even though not charged in the indictment, bank larceny is "a lesser included offense" of bank robbery for purposes of Fed. R. Crim. P. 31(c). He therefore contends that the jury should have been instructed on bank larceny because the theory of his defense at trial was that he took money from the bank without force, violence, or intimidation.

The district court denied the defendant's request on the ground that this court in United States v. Mosley, 126 F.3d 200 (3d Cir. 1997), issued shortly before Carter's trial, held that bank larceny is not a lesser included offense of bank robbery. In Mosley, this court remarked that under Section 2113(a) "the subjective intent of a bank robber to steal is irrelevant; 'the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes.'" Mosley, 126 F.3d at 204 (quoting United States v. Brown, 547 F.2d 36, 39 (3d Cir. 1976)). Conversely, the Mosley court observed that under Section 2113(b), the perpetrator must have the "intent to steal or purloin to satisfy the elements of bank larceny." Mosley, 126 F.3d at 204.

The defendant asserts that even under Mosley the district court still was obligated to instruct the jury on the defense's theory that he committed bank larceny, not bank

robbery. We disagree. Mosley rested solely on the legal interpretation of Sections 2113(a) and (b). See 126 F.3d at 204. We conclude that the district court committed no error in refusing to instruct the jury on bank larceny because this court's holding in Mosley appropriately rested solely on a legal interpretation of Sections 2113(a) and (b). See 126 F.3d at 204.

Notwithstanding the holding in Mosley, the defendant contends that we should reconsider that decision. He argues that an examination of the language of the statute reveals that Congress employed the dictionary definition of the words "steal" and "purloin," contained in the bank larceny provision, when it wrote the bank robbery provision. He notes that the word "purloin" is a synonym of "steal" and that the text of the statute with respect to these terms alternatively defines the same element. He also claims that absent a clear and specific statement by Congress that a particular criminal statute does not require a mens rea, this element of intent is presumed to exist. Consequently, he submits that omission of the mens rea requirement in the text of the bank robbery statute raises a presumption that mens rea is a requisite element of bank robbery. Thus, he submits that the intent to steal is an element of both bank larceny and bank robbery. Finally, he contends that the Mosley decision was based on a mistaken and incomplete consideration of the common law history of bank robbery and bank larceny, and an incorrect application of the relevant case law. We disagree with the defendant in all respects because Congress created a statutory crime of robbery that is set forth fully in Sections 2113(a) and (b).

First, in Brown, this court held that specific intent is not an essential element of a violation of Section 2113(a). Second, under the modern robbery statute, Congress did not use the language of the common law to define the offenses of bank robbery and bank larceny. See Bell v. United States, 462 U.S. at 360 (citing Turley, 352 U.S. at 411-412). Finally, Section 2113(b) is broader than the common law definition because common law larceny was limited to thefts of tangible personal property. Accordingly, we conclude that our decision in Mosley need not be disturbed.

B.

The defendant also contends that the district court misinterpreted and misapplied United States Sentencing Guideline Section 3E1.1 in denying him a reduction in the offense level because he accepted responsibility for the offense. He submits that he accepted responsibility for his criminal conduct for purposes of Section 3E1.1 because he conceded at trial that he committed bank larceny, but denied that his conduct amounted to the offense of bank robbery because he did not use force, violence, or intimidation.

The district court's decision to deny the claim for acceptance of responsibility is reviewed for clear error. See United States v. Muhammad, 146 F.3d 161, 167 (3d Cir. 1998). The reduction for acceptance of responsibility generally does not apply to a defendant "who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, Application Note 2. At trial, Carter challenged the testimony of Ms. Zahn, claiming that his physical contact with her was wholly accidental, and that

she did not scream. He attacked the Government's evidence as to his threatening remark as he fled from the bank. Finally, in his summation, he argued that there was no implicit threat of violence or injury to discourage a pursuit. These challenges to the Government's case are inconsistent with an acceptance of responsibility.

Accordingly, we conclude that the district court committed no error in rejecting defendant's request for a reduction in his offense level. See United States v. DeLeon-Rodriguez, 70 F.3d 764, 767 (3d Cir. 1995)(district court properly denied acceptance reduction after appellant pleaded not guilty and contested his factual guilt beyond a mere legal challenge); United State v. Veksler, 62 F.3d 544, 551 (3d Cir. 1995).

C.

Lastly, the defendant contends that the district court erroneously denied his motion for acquittal pursuant to Fed. R. Crim. P. 29 because the Government failed to establish that he used force, violation, or intimidation to perpetrate the predicate offense. When a jury returns a verdict, this court's review is plenary and, in employing that review, we must view the evidence in the light most favorable to the Government to determine if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Burks v. United States, 437 U.S. 1, 17 (1978); United States v. Leon, 739 F.2d 885, 890 (3d Cir. 1984).

To obtain a conviction for unarmed bank robbery under Section 2113(a), the Government must prove that the defendant: (1) used force and violence or intimidation; (2) took or attempted to take from the person or presence of another, (3) money, (4) in the

care, custody, or control of a federally insured bank. To establish "intimidation" under Section 2113(a), the Government need show only that "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." Untied States v. Woodrup, 86 F.3d 359, 363 (4th Cir. 1996). The evidence shows that the defendant wore a ski mask that covered his entire face except for his eyes and mouth, and that he gained access to the teller cages by forcefully, speedily, and impermissibly vaulting the customer service counter. These abnormal activities plainly were acts of intimidation, as well as his exertion of force on Ms. Zahn. We see no error in the district court's denial of the defendant's motion for acquittal.

III.

For the foregoing reasons, the judgment of conviction and sentence of the court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

Not only do we survive or meet the Rule 29 standard, but this evidence will establish his guilt beyond a reasonable doubt and so, therefore, I would respectfully request that the motion be denied and we submit this case to the jury.

THE COURT: Mr. Reilly, do you have anything in response?

MR. REILLY: Your Honor, I just want to make one comment, and indicating in response to the Government's argument that the mask in itself is intimidation. The law is that intimidation involves conduct that is reasonably calculated to instill fear of bodily harm. I don't think that that intimidation occurred in this case, and there's no evidence in this case that that intimidation occurred. And I submit that the motion should be granted.

THE COURT: There's no dispute about the standard for the Court's evaluating a Rule 29 motion is that the evidence must be viewed in a light most favorable to the Government who is the non-moving party. And that the question is whether a reasonable jury could find in favor of the Government on the charge presented beyond a reasonable doubt.

The arguments of counsel have accurately reviewed what are basically uncontroverted facts. But I will review the evidence as well.

There is ample evidence in this even brief trial establ charge. It has been established by the evidence that the

defendant knowingly and willfully took money from or in the presence of employees of the Collective Savings Bank on the date in question. That's the first element.

The second element, likewise, has been satisfied. It has been established through the testimony of the bank manager, Mr. Phipps, as well as the corroborating testimony of an officer of Hamilton Township that the money that Mr. Carter was found with was, in fact, the money which had been taken from the management and possession of the bank. There was bait money involved and the serial numbers of the bait money were maintained by the bank and found on at least 50 of the -- exactly 50 of the bills that were in Mr. Carter's possession when he was apprehended directly after the incident at the bank.

And, of course, through the bank manager, the Government has established that the bank and its deposits were insured by the FDIC at the time of the incident.

And so, the issue here will boil down to whether the evidence presented, a reasonable jury could find beyond a reasonable doubt that Mr. Carter took this money by means of force, violence or intimidation. And here again, the facts are relatively -- the essential facts are uncontroverted but they have been established through the evidence.

The first witness was Maria Zahn, who was a customer at the time of the incident. She testified that on the date in

question which was September 9, 1997, it was a nice day. The weather was fairly warm. She had completed her business at the teller window at approximately 2:00 and was exiting the bank in order to pick up her children from school.

As she approached the exit door of the bank, she was confronted face-to-face by a person entering that door from the right who was wearing a knitted ski mask and heavy winter clothing. He opened the door and she immediately wanted to run out. He grabbed her physically with both hands and pushed her inside, saying, hold on. In other words, restraining her exit from the bank and then moved her or turned her in such a way as to spin her out of his way as he rapidly entered the bank. And with that, he said move over.

She also testified here that she screamed upon having that encounter. He rapidly moved on past her. She watched him as he moved in the direction of the tellers. After that her part in this scenario was over.

The next witness to testify was a customer service rep named Marjorie Kudney, and she was sitting at a customer service desk directly inside the door in question and she had a cubicle of sorts which gave her complete vision of the lobby area of the bank and the teller windows. And so she was an observer of these events rather than a direct participant.

She said that she first noticed anything irregular when she heard a scream. She looked up and saw a lady, a

customer exiting through that door and then she immediately looked to her right and saw a man jumping over the counter into the teller stations. She described the man, also, as wearing a mask and dark clothes. Then she said that this man walked behind the teller area and appeared to be taking money from the teller stations. She was also seated at her desk throughout this brief episode. And as the man left, she said that she heard the man say, don't follow me. And she indicated that she was feeling nervous and a little frightened having witnessed this.

The cross examination brought out that she had -- Ms. Kudney had indicated to the police that at no time was she in fear for her life and that she saw no weapon and heard no threats except the last statement which was not to follow him. She heard no demands being made by him. She did interpret the last statement as sort of a threat and also she stated on re-redirect that although she was not in fear of her life, she was in fear at that sequence of events.

The next witness to testify was Mildred Kalikal; she was one of the tellers. She was there at the teller station at approximately 2:00, assisting a male customer, and all of a sudden she saw the man described jumping over the counter at Ms. Hairsten's station which was two down from her. She testified that Ms. Senteck's station was the one immediately to her left and that after the man had jumped over at Ms.

Hairsten's station, Ms. Hairsten had run from her teller station to the branch manager's office and that the man had gone to Senteck's station, opening the drawers of Senteck's teller equipment station and -- both top and bottom drawers, he opened -- and he took the money out of those drawers and put it in a brown grocery bag.

Ms. Kalikal testified that while this was occurring at Ms. Senteck's station, Ms. Senteck was at her station crying and trembling. Ms. Kalikal also said that as this was transpiring, the man in the mask said to all of them -- at this point it would be two of them -- that he wouldn't hurt anybody.

Ms. Kalikal also testified, over the objection of defendant, that as she witnessed this sequence of events and as he then came to her drawer, standing about two feet from her, she felt scared. She was afraid that there might be a weapon. And although the man said that he wouldn't hurt anyone, she was still afraid. She had never encountered anything like that in all her life. She was really scared; did not know what to do and she stood motionless while the man proceeded to open her top drawer, moving quickly, and removing money from that drawer and putting it in his bag.

She also witnessed him leaving saying that no one should follow; and she perceived this as a threat, such that if anyone did follow, he might hurt them.

She did confirm that she was not verbally threatened

and that no demands were made to her.

The branch manager Mr. Phipps testified he had his own office, which gave him full view of the lobby because he had an interior glass window and his door was opened at the time. He was sitting at his desk when he heard a loud bang, and then a blur, via monitor, running across the lobby, which he perceived as a man. As the man reached Ms. Hairsten's station, he saw the man leap into Ms. Hairsten's station by jumping in one leap -- he hurtled the counter in one leap.

Mr. Phipps was not quite sure how this man negotiated the ropes and stanchions, which indicated the line for the customers, but he did confirm that the man ran toward the teller counter and that he jumped over at the location of Ms. Hairsten's counter, whereupon Ms. Hairsten ran into Mr. Phipps' office saying he's after me, and also saying my purse is still there.

At that point Mr. Phipps replied to her that in Mr. Phipps' observation the man was not after Ms. Hairsten, he was after the bank's money and not after her purse. He was after the banks' money.

At that point Mr. Phipps pressed the alarm while he witnessed the man going to the several teller drawers, taking the money and then exiting by leaping over the same counter from which he had entered and going out of the bank.

He said he was upset and scared while all this

occurred and that when the man left he described that the tellers were frozen and that while he had taken the money, according to his testimony, he perceived that those particular tellers were scared to death and that they stood there without looking at the man.

He confirmed also that no weapons were used in this incident and that he heard no demands while the man was taking the money. He also confirmed -- I'm not sure whether he corroborated the testimony of the others, which is undisputed -- that as the man left he said don't follow.

Mr. Phipps provided additional testimony to the effect of what he did in order the manage the bank once the man left. Namely, he had the interior lock thrown so that everyone within the bank was secure and then he started the investigational procedures, including with the customer who had been standing at Ms. Kalikal's station at the time.

The testimony of Officer Inman (sic) had to do with the apprehension and putting in the various physical items of evidence so they do not go to the events within the bank, except that they do confirm what the defendant was wearing; namely, that when he was apprehended he had in his possession a black ski mask and that he was wearing not only heavy clothing, but several layers of clothing, including at least two layers of pants as possible outer-wear.

Special Agent, F.B.I. Agent James Maxwell testified

that he interviewed the defendant immediately after the arrest and after providing him with his rights and having him also read a waiver statement, which was signed and witnessed at 3:05 p.m., less than an hour after the incident.

Among other things, as reported by Agent Maxwell, the defendant did admit taking the money; he did admit entering the bank for that purpose, but said that he went to the bank to snatch the money and that he went into the bank so that he could take the money.

I have reviewed again the Mosley case, this time from the standpoint of what sorts of facts could support a conviction on what is called bank robbery, which is found at 18 U.S.C. Section 2113(a). The indictment in this case does charge that offense.

It does not charge the offense set forth at 18 U.S.C. Section 2113(b), which is known as bank larceny, and earlier we were discussing defendant's motion that this case should be regarded as, at least, potentially including the bank larceny charge as a lesser included offense. We will get to that again, of course, as we deal with the jury charge, but the Mosley case does set forth the facts of the two robberies which were involved in Mosley which resulted in convictions on the bank robbery charge. It also discussed the difference between bank robbery and bank larceny as envisioned by Congress in passing these in two separate provisions.

In the Mosley incident there was a confrontation of tellers at the a First Fidelity Bank on November 20, 1995; and a different First Fidelity Bank on November 9, 1995, which were charged in that case.

In the first count offense the individual had approached the teller window, leaned toward her and said this is a hold up and instructed her to open the drawer and give him the money and the teller did so, while he was telling her to hurry, hurry, and get the big bills first.

At that case there was a gesturing by the defendant as if he had something there, but there was no weapon actually used or brandished or mentioned.

In the second incident the same man entered the different bank on a different date with a sign reading "hold up" and approached the teller station. The teller testified that Mosley placed both of his hands on the counter and said can I have all your money, with the perpetrator using a defensive, but demanding, tone of voice. She gave him first bait money, which he threw back at her and then she gave him the other money and the defendant walked out at a fast pace and the teller walked away at that point, in that circumstance.

So those were confrontations. They did involve demands, which this case did not. They did not involve weapons, and neither did this case.

In the discussion of the Third Circuit Court of

Appeals in the Mosley decision in which they did find, of course, that as a matter of law in this Circuit it is their view that the bank larceny offense is not a lesser included offense of the bank robbery offense because the bank larceny offense has a specific intent to steal element not found in the bank robbery offense; and, of course, the Mosley case did recognize that in reaching that conclusion they find themselves in the minority of circuits, at least at this time.

They explained by reference to earlier cases, both in another circuit and in our United States Supreme Court, the legislative history of the bank larceny statute, Section 2113(b); and in brief reference, I am reviewing it because I think it sheds some light on what is the distinction between bank larceny and bank robbery.

They said that Congress initially passed the bank robbery legislation, now found as Section 2113(a), in 1934 and declined at that time to pass a bank larceny provision which had been proposed. They added the larceny provision three years later, according to the Mosley decision, in reaction to a case in which a man walked into a bank and without confronting any bank employees helped himself to $11,000.

Thus, said Mosley, the larceny statute seems designed to address a different factual scenario than the typical bank robbery case.

I have followed up by looking at the Supreme Court

case which sets forth this history of the bank larceny statute, and that is found in Bell v. United States, 462, U.S. 356. The Mosley case particularly refers to Section 365, Note 4 of that decision, which is found in Justice Steven's opinion dissenting; however, the history of the statute is found in that dissenting opinion and the facts in the case referred to -- I will read that footnote, which is a quote from the Congressional Record (1937). The Congressional Record says;

> " The fact that the statute [as of 1937 that was] is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees without displaying any force or violence and without putting anyone in fear, which are necessary elements of the crime of robbery, and was about the leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute..."

So it is conceivable, it seems to me, that a person could commit bank larceny while walking into a bank and not have that taking rise to the level of bank robbery, even if it

is not a taking by trickery such as cheating a bank teller out of money by presenting a bad check or something.

However, the facts of this case are far removed from a peaceable and stealthy theft of money from this bank and I think that a reasonable jury could indeed find beyond a reasonable doubt, based upon the evidence which has been presented in this case that, objectively speaking, the behavior of Mr. Carter was such as could put a reasonable person in fear of bodily harm and that that could amount to force or intimidation such as to satisfy the third element of the bank robbery offense.

For those reasons, and with due regard to the able and I think very effective presentation by counsel for the defendant, I deny the motion which has been brought under Rule 29.

At this point we do anticipate that the Government will rest and, Mr. Reilly, you have your opportunity to present any case that you wish on behalf of your defendant after that.

MR. REILLY: Okay. Judge, did you want to do the jury charges now or will we do it --

THE COURT: Well that's what I'm thinking. Again, because we'll bring the jury out and if both sides are going to rest then they will leave.

MR. REILLY: If I could just have a minute on that last issue, Judge.

(46)

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v.

Case Number 3:97-CR-520 (NJ)
3:98-CR-475 (PA)

FLOYD J. CARTER a/k/a "Daniel O'Reilly"

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, FLOYD J. CARTER a/k/a "Daniel O'Reilly", was represented by Brian Reilly, AFPD.

The defendant was found guilty on count(s) 1 of indictment by a jury verdict on 01/23/98 after a plea of not guilty in Cr. 97-520 (NJ); the defendant pled guilty to counts 1-3 of indictment on 8/28/98 in Cr. 98-4754 (PA). Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:2113(a)	Bank robbery	9/9/97	1 (Cr. 97-520)
18:2113(b)	Bank larceny	8/27/97	1-3 (Cr. 98-475)

As pronounced on 10/15/98, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $400 , $100 each on count(s) 1 of indictment in Cr.97-520,and counts 1-3 of indictment in Cr. 98-475, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 27th day of October, 1998.

ENTERED
on THE DOCKET
on 10-28 1998
WILLIAM T. WALSH, CLERK
By _____ (Deputy Clerk)

FILED
OCT 28 1998
AT 8:30 _____ M
WILLIAM T. WALSH
CLERK

Mary L. Cooper
MARY L. COOPER
United States District Judge

Defendant's SSN: 136-48-0876
Defendant's Date of Birth: 04/27/55
Defendant's mailing address: Monmouth County Correctional Center; 1 Waterworks Road; Freehold, NJ 07728
Defendant's residence address: 29 Conger Avenue; New Brunswick, NJ

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 215 months on Count 1 of Cr. 97-520 (NJ) and a concurrent term of 120 months on Counts 1-3 of Cr. 98-475 (PA) with each count running concurrently with each other, with credit for all time in custody.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

The defendant shall submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

The defendant shall refrain from the excessive use of alcohol and shall submit to testing to ensure compliance. It is further ordered that the defendant submit to evaluation and treatment if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that the defendant shall submit to drug treatment, on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.
2) The defendant shall not illegally possess a controlled substance.
3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.
4) The defendant shall not leave the judicial district without the permission of the court or probation officer.
5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
7) The defendant shall support his or her dependents and meet other family responsibilities.
8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

RESTITUTION AND FORFEITURE

RESTITUTION

Restitution in the total amount of $11,993.00 to be divided proportionately to reflect half of the amount of loss sustained by the Sovereign Bank, 1102 Taylorsville Rd., Washington Crossing, NJ and First Federal Savings and Loan Association, 272 W. Bridge St., New Hope, PA

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	32
Criminal History Category:	VI
Imprisonment Range:	210 months to 240 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$ to $ 17,500
Restitution:	$ 11,993

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Career offense finding.

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
WILLIAM T. WALSH, CLERK
By _____
Deputy Clerk

(a)

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v.

FLOYD J. CARTER a/k/a "Daniel O'Reilly"

Defendant.

Case Number 3:97-CR-520
3:98-CR-475

FILED

DEC 0 8 1998

AT 8:30
WILLIAM T. WALSH
CLERK

AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, FLOYD J. CARTER a/k/a "Daniel O'Reilly", was represented by Brian Reilly, AFPD.

The defendant was found guilty on count(s) 1 of indictment by a jury verdict on 01/23/98 after a plea of not guilty in Cr. 97-520 (NJ); the defendant pled guilty to counts 1-3 of indictment on 8/28/98 in Cr. 98-4754 (PA). Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:2113(a)	Bank robbery	9/9/97	1 (Cr. 97-520)
18:2113(b)	Bank larceny	8/27/97	1-3 (Cr. 98-475)

As pronounced on 10/15/98, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $400 , $100 each on count(s) 1 of indictment in Cr.97-520,and counts 1-3 of indictment in Cr. 98-475, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 4th day of December, 1998.

ENTERED
on
THE DOCKET
on 12/8 1998
WILLIAM T. WALSH, CLERK
By _____
(Deputy Clerk)

Mary L. Cooper
MARY L. COOPER
United States District Judge

Defendant's SSN: 136-48-0876
Defendant's Date of Birth: 04/27/55
Defendant's mailing address: Monmouth County Correctional Center; 1 Waterworks Road; Freehold, NJ 07728
Defendant's residence address: 29 Conger Avenue; New Brunswick, NJ

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 215 months on Count 1 of Cr. 97-520 (NJ) and a concurrent term of 24 months on Counts 1-3 of Cr. 98-475 (PA) with each count running concurrently with each other, with credit for all time in custody.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

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The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that the defendant shall submit to drug treatment, on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

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6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
7) The defendant shall support his or her dependents and meet other family responsibilities.
8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
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11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
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Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

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RESTITUTION

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The court adopts the factual findings and guideline application in the presentence report.

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Restitution:	$ 11,993

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Career offense finding.

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
WILLIAM T. WALSH, CLERK
By: _____
Deputy Clerk

Appendix – Statutory Provisions Involved

I. Present-Day Provisions

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny —

Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or

agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" means—

(1) a Federal savings association or State savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.

18 U.S.C. § 2113 (1994 & Supp. III).

II. Provisions Prior To 1948 Recodification Of Criminal Code

§ 588b. Robbery of bank; assault in committing or attempting to commit bank robbery; receiving or disposing of stolen goods.

(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

(c) Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of

subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

12 U.S.C. § 588(b) (1940).

III. 1948 Provision On Classification Of Offenses

§ 1. Offenses Classified.

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

18 U.S.C. § 1 (Supp. V 1947-52).